STATE OF WISCONSIN
BEFORE THE WISCONSIN EMPLOYMENT RELATIONS COMMISSION

JORGE DELGADO, Appellant,

vs.

STATE OF WISCONSIN DEPARTMENT OF ADMINISTRATION, Respondent.

Case ID: 315.0007
Case Type: PA

DECISION NO. 36915

Appearances:

William Leanderts, Representative, 1410 Loftsgordon Avenue, Madison, Wisconsin, appearing on behalf of Jorge Delgado.

Cara J. Larson, Attorney, Wisconsin Department of Administration, 101 East Wilson Street, 10th Floor, P.O. Box 7864, Madison, Wisconsin appearing on behalf of the State of Wisconsin Department of Administration.

DECISION AND ORDER

On January 6, 2017, Jorge Delgado filed an appeal with the Wisconsin Employment Relations Commission, pursuant to § 230.44(1)(c), Stats., asserting he had been discharged without just cause by the State of Wisconsin Department of Administration. The appeal was assigned to Peter G. Davis for the purpose of conducting a hearing and issuing a proposed decision and order.

Hearing was held on February 9, 2017, in Madison, Wisconsin.

On March 14, 2017, Examiner Davis issued a proposed decision and order modifying Delgado's discharge to a suspension. No objections to the proposed decision were filed and the matter became ripe for Commission consideration on March 21, 2017.

Being fully advised in the premises, the Commission makes and issues the following:

FINDINGS OF FACT

1. Jorge Delgado was employed as a groundskeeper by the State of Wisconsin Department of Administration for six years until his discharge on October 6, 2016. He had permanent status in class.

2. Delgado was absent from work for three consecutive days because he was in jail. While in jail, Delgado made unsuccessful efforts to contact his supervisor.

Based on the above and foregoing Findings of Fact, the Commission makes and issues the following:

CONCLUSIONS OF LAW

1. The Wisconsin Employment Relations Commission has jurisdiction to review this matter pursuant to § 230.44(1)(c), Stats.

2. The State of Wisconsin Department of Administration did have just cause within the meaning of § 230.34, Stats., to discharge Jorge Delgado.

Based on the above and foregoing Findings of Fact and Conclusions of Law, the Commission makes and issues the following:

ORDER

The discharge of Jorge Delgado is affirmed.

Signed at the City of Madison, Wisconsin, this 1st day of May 2017.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

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James R. Scott, Chairman

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James J. Daley, Commissioner

I dissent.

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Rodney G. Pasch, Commissioner

MEMORANDUM ACCOMPANYING DECISION AND ORDER

This case raises a significant issue concerning the role of the Wisconsin Employment Relations Commission in the review of discipline imposed by state agency employers. We have traditionally reviewed those actions applying an analysis which asks: (1) did the employee engage in the conduct in question; and if so, (2) did the employee violate the work rule in question (or was the conduct obviously inappropriate in the workplace); and if so, (3) was the level of discipline excessive. The just cause test has been stated various ways but the essence is as set forth above.

Questions one and two are evidentiary matters for which the state employer has the burden of proof. Stated more simply, they raise questions of, did he do it and, if so, did he know or should he have known the conduct was prohibited. With regard to the question of whether the punishment fits the crime, we place the burden on the employee to establish inconsistency and, once having been proved, shifts the burden back to the employer to explain the disparity in levels of punishment. Progressive discipline is a frequent and perfectly valid explanation but other elements may factor in. We require consistency only within individual agencies or even facilities unless the state employer voluntarily chooses otherwise.

We avoid simply substituting our judgment for that of the employer when reviewing the level of discipline. Occasionally, we also are asked to question the employer's decision to make certain conduct a subject of punishment. Again, we attempt to avoid second guessing the employer's judgment as to what conduct should be subject to discipline.

Our role is to ensure that employees receive a fair review of the discipline imposed consistent with their due process rights.

With regard to the matter of Jorge Delgado and his failure to call in or appear at work for three consecutive days. We know from our experience in the private sector, the so called "three day no-show no-call" is commonly a dischargeable offense. Often times, it is incorporated in collective bargaining agreements. While it may be stating the obvious, clearly an "essential element of any job … is the ability to appear for work." *Rogers v. International Marine Terminals*, 87 F.3d 755 (5th Cir. 1996). While there are many legitimate reasons for absence from work, there are hardly any acceptable reasons for a failure to provide notice of an upcoming absence.

For many years, our statute governing civil service matters included an "abandonment" provision. As originally crafted, § 230.34(1)(am), Stats., provided that in the case of an employee who for a "minimum of five consecutive days" failed to appear and failed to contact his supervisor, the employer "shall consider the employee's position abandoned and may discipline the employee or treat the employee as having resigned his or her position."

With the passage of 2015 Act 150, the statute was modified to eliminate the consecutive days requirement and to reduce the number of days to three in a calendar year. As a consequence, state employees went from being subject to a tolerant rule to a much more restrictive rule. Under either version the employer was allowed to impose the maximum penalty, i.e. job loss or in its discretion some lesser form of discipline.

The examiner found it significant that the employer labeled the decision to part ways with Delgado as a termination rather than an involuntary resignation. We conclude it is a distinction without a difference. Whether characterized as a discharge, a termination, or an involuntary resignation the result is the same. A decision by the employer that the employee has "resigned" is clearly not a voluntary departure from the workplace.[1]

There is no dispute that Delgado did not appear or call in for three consecutive days. The statute dictates a departure from the service unless the employer deems the circumstances worthy of a reduction in the punishment. Delgado was incarcerated following a domestic dispute and had no access to his cell phone. He made attempts to have his son-in-law physically locate his supervisor but the efforts were unsuccessful. The employer later learned of the efforts and chose not to exercise its discretion. We see that as a understandable reaction to the situation.

The examiner gave Delgado credit for his marginal effort at having his son-in-law physically attempt to contact his supervisor. We find that effort wanting. The examiner also included in passing that there was no evidence that DOA was harmed by the absence. We reject any notion that proof of "damage" is an element of this offense.

The Legislature has determined the failure to call-in and appear at work for three days in one calendar year is sufficiently harmful to the interests of the employer to warrant discharge. The decision to impose a lesser penalty is in the hands of the employer. Here, the examiner chose to substitute his judgment for that of the employer based upon an undisputed set of facts. There is no evidence that others who committed the same offense were treated more favorably. Likewise there is no evidence that DOA acted arbitrarily or irrationally in deciding the proffered excuses warranted a lesser penalty.[2]

Accordingly, we affirm the decision to discharge Delgado from his employment.

Signed at the City of Madison, Wisconsin, this 1st day of May 2017.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

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James R. Scott, Chairman

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James J. Daley, Commissioner

[1] Thirty-six years ago, the Personnel Commission concluded that it had jurisdiction over § 230.34(1)(am) "resignations" as they were in fact discharges. *Petrus v. DHSS*, Dec. No. 81-86-PC (1981).

[2] The fact that DOA initially reinstated Delgado while determining what course of action to follow simply indicates thoughtful decision-making.

DISSENTING OPINION OF COMMISSIONER RODNEY G. PASCH

I would reinstate Delgado but without back pay. The applicable statutory language does not mandate discharge as the disciplinary penalty for three "no-call no-show" days, and I am persuaded that Delgado made a good faith effort to contact his supervisor during his three days of incarceration. I am further influenced to modify the discharge by DOA's willingness to allow Delgado to return to work upon his release from jail. This factor indicates that the employment relationship between Delgado and his supervisor was not broken and that no significant DOA interests would be compromised should he be reinstated on a permanent basis. In this regard, I note that DOA did not file any objection to the examiner's proposed decision which also reinstated Delgado without back pay.

Signed at the City of Madison, Wisconsin, this 1st day of May 2017.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

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Rodney G. Pasch, Commissioner